Environmental Regulation Update

SEVERAL ENVIRONMENTAL LAWS AND REGULATIONS ENACTED IN 2013 MAY BENEFIT RETAILERS IN SOME RESPECTS, BUT OTHERS ARE LIKELY TO PLACE ADDITIONAL REGULATORY BURDENS ON ALREADY OVER-REGULATED RETAILERS AND SUPPLIERS.

Safer Consumer Product Regulations

The Department of Toxic Substance Control's Safer Consumer Product Regulations became law on Oct. 1, 2013, and will be phased in over the next several years. The regulations contain detailed procedures to implement California's Green Chemistry Initiative.

The regulations require product manufacturers to try to replace existing chemical ingredients with alternatives that are deemed safer for consumers and the environment. The regulations will require many companies to make major investments in compliance and changes to product design planning and supply chain management.

The regulations require DTSC to identify candidate chemicals of concern, and to develop a list of "Priority Products" containing those candidate chemicals. Manufacturers of Priority Products will have to notify DTSC and analyze possible chemical alternatives for those products.

Those manufacturers may be required to reformulate their Priority Products, or face a possible California sales ban. Although the regulations impose the principal duty of compliance on the manufacturers, importers are secondarily liable.

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Moreover, if a manufacturer fails to make the required changes to its Priority Product, retailers may be required to stop ordering the Priority Product within 90 days of the product being listed by DTSC.

DTSC has released an informational list of candidate chemicals of concern that are potentially subject to regulation. DTSC expects to propose the initial Priority Products list by April 1, 2014.

Manufacturers should now be gathering chemical information regarding their products, and comparing that information to the initial list of candidate chemicals. Once DTSC releases its list of Priority Products, retailers should take note of how many of those Priority Products are sold in their stores.

Of particular note to retailers, the regulations require the disclosure of market presence information, statewide sales volume data, and statewide sales by unit data without providing protection for that information as confidential. The regulations failed to provide trade secret protection to the regulated parties because the provisions that would have provided such protection were disapproved by the California Office of Administrative Law. DTSC has proposed revised regulations, but these provisions have not yet been approved. We will monitor the progress of these trade secret provisions, as they may be of particular importance to retailers.

Changes to Proposition 65

On Oct. 5, 2013, Gov. Jerry Brown signed into law AB 227, which is aimed at reducing "bountyhunter" litigation against businesses who prepare and sell food or beverages for immediate consumption on or off their premises if the Prop. 65 listed chemical found in the food or beverage was not intentionally added, and was formed by the cooking or preparation of the food or beverage.

Assembly Bill 227 amends the citizen enforcement provision for these types of businesses that fail to provide warnings to consumers. The law now gives these businesses 14 days after notice to comply with the warning requirements before an enforcement action can be filed. It also sets the fine at a one-time payment of $500 (indexed for inflation) and further limits the number of violations that can be imposed from the same exposure in the same facility.

Although the changes to Prop. 65 fell far short of the broader reforms Gov. Brown proposed in the Spring

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of 2013, these changes represent the first significant limit on Prop. 65 plaintiffs and their counsel in many years.

Urban Development ("Brownfields")

For years, redevelopment agencies have used the Polanco Redevelopment Act to clean up contamination from properties in urban blighted areas. The Act allowed redevelopment agencies to require the parties responsible for the contamination to prepare and implement a clean-up plan or face significant damages for not agreeing to do so.

Urban redevelopment included grocery stores, and allowed stores to be built on previously cleaned up property without taking on any of the liabilities typically imposed on an owner or lessee of the former contaminated property.

Almost two years ago, Gov. Brown eliminated redevelopment agencies. As these agencies were dismantled, redevelopment of blighted properties was drastically reduced, and the Polanco Redevelopment Act was essentially shelved.

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Grocers and other retailers interested in urban infill sites for new or expanding store locations should talk with their local building or planning departments about the use of the revised Polanco Redevelopment Act as a tool to ensure that any building site that may contain contamination is fully cleaned up by the responsible parties prior to building on that site.

New Developments in Stormwater Regulation

In July of this year, a group of environmental organizations, including American Rivers, Conservation Law Foundation, and the Natural Resources Defense Council, petitioned the U.S. Environmental Protection Agency (USEPA) to impose stormwater permitting requirements under the NPDES program on facilities that are not currently covered by the Clean Water Act (CWA).

The petitions request that USEPA use an infrequently invoked provision, called the Residual Designation Authority (RDA), to impose stormwater permit requirements on currently unregulated, non-de minimis commercial, industrial, and institutional sites within impaired watersheds in several EPA Regions, including Region 9 that covers California.

These sites would include malls, shopping centers, office buildings, commercial warehouses, schools, hospitals, and a variety of other businesses, along with associated yards and parking areas. USEPA has 90 days to act on the petitions; however, to date, USEPA has yet to respond.

The RDA serves as a "catch-all" provision, authorizing USEPA to designate other stormwater

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sources for regulation if those sources contribute to a violation of a water quality standard or are found to be significant contributors of pollutants to waters of the United States.

Utilizing this authority, it is feared that USEPA will broaden the scope of existing stormwater regulation by single facility, by category of discharge, or even by statewide or watershed-wide designations. If invoked, USEPA's RDA in this context could have wide-reaching consequences for a variety of sectors currently not included within the types of activities to which stormwater requirements apply.

Businesses such as retail and distribution facilities related to the grocery industry should be concerned about this potential change, which would increase compliance costs and subject the industry to additional scrutiny and litigation. ■

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